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8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA,
10 OAKLAND DIVISION
11

12 Rosa Lopez, as Legal Guardian of V-S-,
a Minor and Successor in Interest to the
13 Estate of Victor Sanchez Brito,

14 Plaintiffs,

15 v.

16 United States of America; GEO Group,
Inc., a corporation,

17 Defendants.
18
19

Case No. 4:23-cv-04292-DMR

**DEFENDANT GEO'S NOTICE OF
MOTION AND MOTION TO
DISMISS; MEMORANDUM OF
POINTS AND AUTHORITIES**

*(Proposed Order filed concurrently
herewith)*

Date: December 14, 2023
Time: 1:00 p.m.
Ctrm.: 4 [HELD VIA ZOOM]

Judge: Hon. Donna M. Ryu

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21 TO THE COURT AND ALL PARTIES AND COUNSEL OF RECORD:

22 PLEASE TAKE NOTICE THAT on December 14, 2023, at 1:00 p.m. or as
23 soon thereafter as the matter may be heard before the Honorable Donna M. Ryu,
24 United States Magistrate Judge, in Courtroom 4, of the Northern District of
25 California, located at 1301 Clay Street, Oakland, California, Defendant The GEO
26 Group, Inc. will and hereby does move this Court to dismiss the claims brought
27 against GEO in the Complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6).
28 Plaintiff Lopez also lacks independent standing for any of the claims.

1 Plaintiff's claim under the Rehabilitation Act must fail because GEO does not
2 receive federal financial assistance but is instead a contractor. Plaintiff's Unruh Act
3 claim also is not cognizable because the requisite intent is not alleged and the Mesa
4 Verde Detention Facility is not a "business establishment" subject to Unruh. Finally,
5 Plaintiff Rosa Lopez lacks standing as a Plaintiff for any of the claims, and instead
6 V-S as the successor in interest is the only proper plaintiff for a survival action, with
7 Lopez the Guardian Ad Litem.

8 This motion is based on this Notice of Motion, the attached Memorandum of
9 Points and Authorities, the pleadings and papers on file in this action, and such other
10 matters as may be presented to the Court at the time of hearing (if any).

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12 Dated: October 23, 2023

BURKE, WILLIAMS &
SORENSEN, LLP

13
14 By: /s/ Susan E. Coleman
Susan E. Coleman

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16 Attorneys for Defendant
THE GEO GROUP, INC.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Rosa Lopez¹, the mother of decedent Victor Manuel Sanchez Brito, asserts various claims for damages against the United States of America (“USA”) under the Federal Tort Claims Act and against The GEO Group, Inc. (“GEO”) under the Rehabilitation Act and California state laws. (Doc. 1.) As to GEO, Plaintiff brings the following claims: (1) violation of the California Rehabilitation Act (29 USC § 794) prohibiting discrimination on the basis of disability in any program or activity receiving federal assistance; (2) violation of the Unruh Act (Cal. Civ. Code § 51) prohibiting disability discrimination; (3) negligence based on failure to protect Brito and ensure him safe conditions and treatment; (4) intentional infliction of emotional distress; (5) violation of detention standards (Cal. Govt Code § 7320); and (6) violation of the Bane Act (Cal. Civ. Code § 52.1).

II. BRIEF STATEMENT OF FACTS

Shortly after decedent Brito’s arrest by ICE in 2015, he was housed in the Yuba County jail. (Doc. 1, ¶ 61.) Brito remained in Yuba County Jail until July 2018, when he was transferred to Mesa Verde in Kern County. (*Id.*, ¶ 84.) Plaintiff contends that Brito was mistreated, endured deplorable conditions, and that his mental health deteriorated during his time in custody. (*See generally*, Doc. 1.) An unspecified number of months after his release on March 16, 2021, Brito overdosed on drugs², which Plaintiff contends was a suicide rather than accidental. (*Id.*, ¶ 9.)

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¹ The actual named Plaintiffs are somewhat unclear from the Complaint. Rosa Lopez is the mother of decedent, and appears to list herself as a Plaintiff (*see* Compl. [Doc. 1] ¶ 2) rather than as the Guardian Ad Litem of decedent’s minor child – V.S. (*See id.*, caption and ¶ 13.)

² It does not appear that Plaintiff claims wrongful death in the negligence claim, *i.e.* that Brito’s death was caused by his time in custody. (*See* Doc. 1, ¶¶ 170-172.)

1 **III. STANDARD ON MOTION TO DISMISS**

2 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the
 3 legal sufficiency of the complaint. *N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578,
 4 581 (9th Cir. 1983). “Dismissal can be based on the lack of a cognizable legal
 5 theory or the absence of sufficient facts alleged under a cognizable legal theory.”
 6 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). A plaintiff is
 7 required to allege “enough facts to state a claim to relief that is plausible on its
 8 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial
 9 plausibility when the plaintiff pleads factual content that allows the court to draw
 10 the reasonable inference that the defendant is liable for the misconduct alleged.”
 11 *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Though a court is to assume plaintiff’s
 12 allegations are true, the court is not required to accept as true “allegations that are
 13 merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *St.*
 14 *Clare v. Gilead Scis., Inc.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

15 Dismissal is appropriate under Rule 12(b)(6) where the complaint fails to
 16 state a claim for which relief may be granted. *Navarro v. Block*, 250 F.3d 729, 732
 17 (9th Cir. 2001). “In assessing a motion to dismiss, a court may consider documents
 18 beyond the pleadings where the document is incorporated by reference in the
 19 complaint. *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003).

20 **IV. ARGUMENT**

21 **A. PLAINTIFF’S REHABILITATION ACT CLAIM FAILS**

22 In Count 4, Plaintiff alleges that GEO violated the Rehabilitation Act (29
 23 USC § 794). (*See* Doc. 1, ¶¶ 152-162.) This claim must fail because GEO is not a
 24 recipient of federal financial *assistance* as is required.

25 The Rehabilitation Act does not apply to GEO because it does not receive
 26 federal financial assistance. Instead, it is a federal contractor. Plaintiff alleges that
 27 GEO “operates . . . at least one program or activity for ICE for which it receives
 28 federal financial assistance.” (*Id.*, ¶ 155.) Plaintiff cites to the Voluntary Work

1 Program (VWP)³, for which the USA provides a stipend of at least \$1 per day to
 2 incarcerated persons for labor in its facilities. (*See id.*) However, this is not
 3 equivalent to the receipt of a grant, property at below-market value, or other
 4 financial assistance. The clearest example of federal financial assistance is the award
 5 or grant of money. An agency also might provide federal financial assistance in
 6 nonmonetary form; that is, “whatever thing of value is extended by the grant
 7 statute.” *See United States Dep’t of Transp. v. Paralyzed Veterans*, 477 U.S. 597,
 8 607 n.11 (1986) (“Although the word ‘financial’ usually indicates ‘money,’ federal
 9 financial assistance may take nonmoney form,” citing *Grove City Col. v. Bell*, 465
 10 U.S. 555, 564–65 (1984)). Federal financial assistance may include the use or rental
 11 of federal land or property at below market value, federal training, a loan of federal
 12 personnel, subsidies, and other arrangements with the intention of providing
 13 assistance. Federal financial assistance does not encompass contracts of guarantee or
 14 insurance, regulated programs, licenses, procurement contracts by the federal
 15 government at market value, or programs that provide direct benefits.

16 An entity’s receipt of a procurement contract with the federal government
 17 does not subject the contractor to coverage under Title VI. *See, e.g., Fredricks v.*
 18 *City of New York*, No. 12 CIV. 3734, 2013 WL 839584, at *5 (S.D.N.Y. Mar. 6,
 19 2013); *Tolliver v. Xerox Corp.*, 918 F.2d 1052, 1060 (2d Cir. 1990) (receipt of Army
 20 procurement contracts does not render the company a “program or activity receiving
 21 federal financial assistance”); Letter from Robert Kennedy, Attorney General, to
 22 Hon. John Sherman Cooper (April 29, 1964), reprinted in 110 Cong. Rec. 10075,
 23 10076 (1964) (“Title VI does not apply to procurement contracts, or to other
 24 contracts which do not involve financial assistance by the United States.”);

25
 26 ³ The VWP is “voluntary” for detainees but mandatory for ICE contractors such as
 27 GEO. *See* PBNDS § 5.8 (2011, rev. 2016), [https://www.ice.gov/doclib/detention-](https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf)
 28 [standards/2011/5-8.pdf](https://www.ice.gov/doclib/detention-standards/2011/5-8.pdf) This Court may take judicial notice of the PBNDS. Fed. R.
 Civ. P. 201.

1 *Venkatraman v. REI Sys., Inc.*, 417 F.3d 418, 421 (4th Cir. 2005) (defendant’s
 2 “status as a government contractor is irrelevant to Title VI liability [because Title
 3 VI] coverage turns on the receipt of “federal financial assistance”, not the existence
 4 of a contractual relationship”); *LaBouve v. Boeing Co.*, 387 F. Supp. 2d 845, 854
 5 (N.D. Ill. 2005) (Department of Defense contract with a corporation for the
 6 procurement of a fighter aircraft did not constitute federal financial assistance);
 7 *Gallagher v. Croghan Colonial Bank*, 89 F.3d 275, 277 (6th Cir. 1996) (interest
 8 subsidies are akin to procurement contracts); *Cook v. Budget Rent-A-Car Corp.*, 502
 9 F. Supp. 494, 496–97 (S.D.N.Y. 1980) (contracts involving goods or services
 10 purchased at fair market value do not constitute “assistance” because the word
 11 connotes a transfer of funds at reduced consideration or as a subsidy).

12 While Plaintiff may argue that GEO is an indirect recipient of federal
 13 financial assistance because it receives labor from the detainees – subsidized by ICE
 14 – this theory lacks merit. As the Supreme Court explained in *Paralyzed Veterans*,
 15 an entity that merely enjoys indirectly the benefits of federal financial assistance is
 16 not an intended recipient: “While *Grove City* stands for the proposition that Title IX
 17 coverage extends to Congress’ intended recipient, whether receiving the aid directly
 18 or indirectly, it does not stand for the proposition that federal coverage follows the
 19 aid past the recipient to those who merely benefit from the aid.” *Paralyzed Veterans*,
 20 477 U.S. 597, 607 (1986) (citing *Grove City Coll. v. Bell*, 465 U.S. 555, 564
 21 (1984)). Finally, in analyzing whether an entity is a recipient, it is necessary to
 22 distinguish a recipient from a beneficiary: the former must comply with Title VI
 23 while the latter does not. See *Paralyzed Veterans*, 477 U.S. at 606–07. While GEO
 24 is arguably an indirect beneficiary, it is not a recipient of federal financial assistance
 25 and thus this claim must be dismissed.

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B. THE UNRUH ACT CLAIM IS NOT COGNIZABLE

Plaintiff does not make a prima facie showing of intentional discrimination as needed to proceed with her Unruh Act claim and thus it should be dismissed.

Further, Mesa Verde is not a “business establishment” subject to the Unruh Act.

In the Ninth Circuit case of *Greater Los Angeles Agency on Deafness [GLAAD], Inc. et al. v. Cable News Network* (Case. 12-15807, February 5, 2014), Plaintiffs contended that CNN violated the Unruh Act by intentionally excluding deaf and hard of hearing persons from accessing the videos on CNN.com. In making an anti-SLAPP analysis, the Ninth Circuit found Plaintiffs had no probability of prevailing on the merits under the Unruh Act because intentional discrimination based on disability must be shown. The Unruh Act provides that “[a]ll persons within the jurisdiction of [California] are free and equal, and no matter what their . . . disability [or] medical condition . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.” Cal. Civil Code §51(b). By its terms, the Unruh Act “does not extend to practices and policies that apply equally to all persons.” *Turner v. Ass’n of Am. Med. Colls.*, 167 Cal.App.4th 1401, 1408 (2008) (citing Cal. Civ. Code 51(c)).

Thus, to establish a violation of the Unruh Act independent of an ADA claim, Plaintiff must “plead and prove intentional discrimination in public accommodations in violation of the terms of the Act.” *Munson v. Del Taco Inc.*, 208 P.3d 623, 627 (Cal. 2009) (internal quotation marks omitted). The California Supreme Court has clarified that the Unruh Act contemplates “willful, affirmative misconduct on the part of those who violate the Act” and that a plaintiff must therefore allege, and show, more than the disparate impact of a facially neutral policy. *Koebke v. Bernardo Heights Country Club*, 115 P.3d 121, 1228-29 (Cal. 2005) (internal quotation marks omitted); *Harris v. Capital Growth Investors XIV*, 805 P.2d 873, 893 (Cal. 1991), superseded by statute on other grounds as explained in *Munson*,

1 208 P.3d at 627-30; see also *Cullen v. Netflix, Inc.*, 880 F.Supp. 2d 1017, 1024-24
 2 (N.D. Cal. 2012); *Young v. Facebook, Inc.*, 790 F. Supp.2d 1110, 1116 (N.D. Cal.
 3 2011).

4 The California Court of Appeal’s reasoning in *Belton v. Comcast Cable*
 5 *Holdings, LLC*, 151 Cal.App. 4th 1224 (2007) is instructive. The court held that
 6 Comcast did not violate the Unruh Act by packing music services with television
 7 without an option for consumers (particularly blind consumers) to buy the music
 8 service alone. *Id.* at 1229-30, 1237. The court explained that Comcast’s practice of
 9 packaging and selling its products “applied equally to sighted and blind subscribers”
 10 so the policy, which was neutral on its face, was not actionable despite the alleged
 11 disproportionate impact on blind people. *Id.* at 1237-39. Similarly, in the GLAAD
 12 case, CNN did not offer any closed captioning on news displayed on CNN.com so
 13 its policy of displaying video without closed captioning applied equally to all its
 14 website visitors, whether hearing-impaired or not. The court found this failed to
 15 demonstrate CNN’s “willful, affirmative misconduct” or intentional discrimination
 16 and therefore it could not form the basis of an Unruh Act violation. *GLAAD*, Op. at
 17 18, citing *Koebke*, 115 P.3d at 1227-28; see also *Cullen*, 880 F.Supp.2d at 1024-25
 18 (holding plaintiff failed to state an Unruh Act claim by alleging that Netflix failed to
 19 caption “a meaningful amount of its streaming library” because such conduct was
 20 not “willful, affirmative misconduct”); *Young*, 790 F.Supp. 2d at 1114, 1116
 21 (holding Plaintiff failed to state an Unruh Act claim by alleging that Facebook’s
 22 customer service was difficult to use with bipolar disorder because it treated “all
 23 users in the same cold, automated way”).

24 Although Plaintiff alleges his treatment was inhumane and he was denied
 25 programs and services “on account of his disability,” this allegation is made against
 26 *all Defendants* and does not distinguish between them. Nor does it differentiate
 27 between his time at the Yuba County Jail (which GEO does not operate) and Mesa
 28 Verde. (See Doc. 1, ¶ 7.) For example, Plaintiff alleges “*Defendants’* prolonged

1 torment” of Brito “took its toll. . . .” (*Id.*, ¶ 8.) In the section of the Complaint
 2 focused on Mesa Verde, Plaintiff is critical of the entire facility and its treatment of
 3 “[p]eople in the general population at Mesa Verde.” (*See id.*, ¶ 87.) Although
 4 Plaintiff complains of Brito’s conditions while he was in general population (*id.*, ¶
 5 88), these conditions applied to everyone and cannot be said to be intentionally
 6 discriminatory based on his disability.

7 While Plaintiff states that Brito was put into a Restricted Housing Unit (RHU)
 8 for safety reasons according to Defendants, she speculates that it was actually due to
 9 his mental illness. (*See id.*, ¶ 90.) This theory – at odds with the stated reason for
 10 his placement – fails to show intentionally targeted him for RHU placement due to
 11 his disability. Rather, it is the type of situation where a facially neutral policy - -
 12 placing those in danger into protective custody - - may have a disparate impact on
 13 those with mental illness because of them acting out and subjecting them to violence
 14 from other detainees. See *Koebke*, 115 P.3d at 1228-29 (holding a plaintiff must
 15 allege, and show, more than the disparate impact of a facially neutral policy). Nor
 16 does Plaintiff allege that any conditions in RHU were different for Brito than for any
 17 other detainees, who she alleges can be placed in those units for suicide watch,
 18 disciplinary segregation, [or protective custody]. (Doc. 1, ¶ 93, 95.) Accordingly,
 19 Plaintiff fails to allege intentional willful action targeted to Brito’s disability, as
 20 required for an Unruh Act claim, and it should be dismissed.

21 Further, Mesa Verde as an ICE Detention Facility is not a “business
 22 establishment” subject to Unruh. See *Taormina v. Cal. Dept. of Corr.*, 946 F. Supp.
 23 829, 834 (S.D. Cal. 1996). Citing the California Supreme Court’s decision in
 24 *O’Connor v. Village Green Owners Ass’n*, 33 Cal.3d 790, 795 (1983), the *Taormina*
 25 court reasoned that in context of the Unruh Act, the term “business” usually refers to
 26 matters “synonymous with calling, occupation or trade, engaged in for the purpose
 27 of making a livelihood or gain.” *Id.* A prison, the district court reasoned, does not
 28 qualify as a ‘business’ because prisoners are not engaged in a calling, occupation or

1 trade for purposes of making a livelihood or gain.” *Id.* Rather, prisoners are in
 2 prison, not by choice, but “because of crimes which they have committed.” *Id.*
 3 Similarly, detainees in an ICE facility are not in custody by choice. Plaintiff’s Unruh
 4 Act claim should accordingly be dismissed with prejudice.

5 **C. PLAINTIFF LOPEZ LACKS STANDING TO BRING ANY OF**
 6 **THE CLAIMS RAISED IN A SURVIVAL ACTION**

7 Plaintiff contends GEO violated its duty to care for decedent Brito by failing
 8 to protect him and failing to ensure him safe conditions and treatment. Plaintiff does
 9 not allege a negligent wrongful death – likely because Brito died an unstated
 10 number of months after his release due to a drug overdose -- so the negligence claim
 11 here is brought as a survival action, which must be brought by the decedent’s
 12 successor in interest. *See* Cal. Civ. Proc. Code, § 377.30.

13 So too, all of the other claims raised herein. California Code of Civil
 14 Procedure § 377.20 provides that “[e]xcept as otherwise provided by statute, a cause
 15 of action for or against a person is not lost by reason of the person’s death, but
 16 survives subject to the applicable limitations period.” This includes the Bane Act
 17 claim. *Bay Area Rapid Transit Dist. v. Superior Ct.*, 38 Cal. App. 4th 141, 143
 18 (1995). The Bane Act is not a wrongful death statute, but “a *personal* cause of
 19 action for the victim of a hate crime.” *Id.* (emphasis in original). “The Bane Act is
 20 simply not a wrongful death provision.” *Id.* (Dismissing parents’ claim under the
 21 Bane Act for the wrongful death of their son alleging “loss of aid, comfort and
 22 society” under the Bane Act).

23 Brito’s successor in interest is his son V-S. (Doc. 1, ¶ 13.) But V-S is not
 24 listed as a Plaintiff, by and through a Guardian Ad Litem. Instead, Plaintiff Rosa
 25 Lopez – the grandmother of V-S – states she is a proper plaintiff as the Guardian of
 26 V-S. (*See id.*) She cites Fed. R. Civ. P. 17; however, this rule indicates the minor
 27 may sue by way of a Guardian Ad Litem, not that the Guardian is a proper Plaintiff
 28 in her own right. Accordingly, the Complaint must be amended.

1 Further, it should be noted that the recoverable damages herein are limited to
2 the damages that Brito would have been able to recover, including medical expenses
3 (minimal if any due to him being in custody), lost wages (if any), or property
4 damages (not applicable under these facts). Damages for pain and suffering are not
5 recoverable in a survival action. *See* Cal. Civ. Proc. Code, § 377.30.

6 **V. CONCLUSION**

7 For the foregoing reasons, this Court should grant this motion and dismiss the
8 Complaint without leave to amend as to the Rehabilitation Act and Unruh Act
9 claims brought against GEO, and with leave to amend the other claims.

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11 Dated: October 23, 2023

BURKE, WILLIAMS & SORENSEN, LLP

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13 By: /s/ Susan E. Coleman
14 Susan E. Coleman

15 Attorneys for Defendant
16 THE GEO GROUP, INC.
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